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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SURF AND SAND, LLC, a California Limited Liability Company, Plaintiff, CITY OF CAPITOLA, and DOES 1 through 10, Inclusive Defendants.	CASE NO. C07 05043 Judge: Richard Seeborg **E-FILING** Date: December 19, 2007 Time: 9:30 a.m. Ctrm: 3, 5th Floor ACTION FILED: 10/01/07

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

Notwithstanding Plaintiff's ("Parkowner") Opposition, the Court should grant Defendant's ("City") Motion to Dismiss because:

1. Parkowner concedes that all its constitutional claims are facial challenges. Its facial challenges to City's mobilehome park rent control ("RCO") and park closure ("PCLO") ordinances are time-barred because they were not brought within two years of their enactment. Parkowner's citation to *De Anza Properties X, Ltd v. County of Santa Cruz ("De Anza")* 936 F. 2d 1084 (9th Cir. 1990), is inapposite. *De Anza* supports dismissal of Parkowner's facial claims.

2. All of Parkowner's claims, are unripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank ("Williamson")*, 473 U.S. 172 (1985). In *Shelter Creek Dev. Corp v. City of Oxnard,* 838 F.2d 375 (9th Cir. 1988), the Ninth Circuit held that facial equal protection and due process claims had to satisfy the same ripeness requirements as takings claims. Thus, although facial claims do not have to satisfy the first *Williamson* prong of a final administrative decision, they still have to meet the second state compensation prong. Nor does Parkowner come within the futility exception to *Williamson* ripeness; both the United States Supreme Court and the Ninth Circuit consistently have held that California state courts provide adequate procedural compensation remedies for regulatory takings. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999); *Equity Lifestyle Properties, Inc. v. County of San Luis Obispo,* _____ F. 3d ____, 2007 DJDAR 14419, 1421-22 (9th Cir. Sept. 17, 2007); *The San Remo Hotel v. City and County of San Francisco*, 145 F. 3d 1095, 1102 (9th Cir. 1998); and, *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F. 2d 359, 361 (9th Cir. 1993).

3. Parkowner's facial private and public takings claims also fail on the merits because: (a) the challenged ordinances serve legitimate public purposes; and, (b) nothing

on the faces of the ordinances suggests that their mere enactment deprived Parkowner of substantially all economically viable use of its property.

4. Parkowner's facial equal protection claims also fail on the merits because on their faces, the ordinances do not treat similarly situated parkowners differently.

5. Parkowner's substantive due process claims also fail on the merits because on their faces the ordinances are rationally related to legitimate government purposes.

ARGUMENT

I

PARKOWNER'S FACIAL CHALLENGES TO THE RCO AND PCLO ARE TIME-BARRED

In its Opposition, Parkowner avers that its Complaint "raises only facial constitutional claims... ." Opp. at 17.l. A facial challenge to an ordinance must be brought within two years of the ordinance's enactment. *E.g.*, *De Anza, supra*, 936 F.2d at 1085.[1]

Parkowner argues that the enactment of the park conversion ordinance ("PCONO") somehow restarted a new statute of limitations on its facial challenges to the RCO and PCLO. Parkowner's reliance on *De Anza, supra,* is misplaced.

In *De Anza*, parkowners' facial challenge to a rent control ordinance was dismissed as time-barred. On appeal, parkowners argued that because the ordinance subsequently was reenacted twice upon expiration of a sunset provision, and ultimately amended to eliminate the sunset provision, parkowners were entitled to a fresh statute of limitations on a permanent, as opposed to temporary, takings claim. The Ninth Circuit rejected the argument, stating:

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[1] *De Anza's* reference to a one-year statute of limitations is no longer accurate because California Civil Procedure Code section 335.1 subsequently was amended to extend the period to two years effective 2003.

> The flaw in this theory is that the provision of the ordinance which they challenge has remained exactly the same since [the original date of the ordinance's enactment]. The conduct of the county has thus remained exactly the same at all times material to the case, and the effect of the ordinance upon the plaintiffs has not altered.

936 F.3d at 1086.

Here, the PCONO did not amend or in any way alter the effect of the RCO and PCLO on Parkowner. Indeed, it regulates a completely different aspect of Parkowner's property. Under the circumstances Parkowner's claims against the RCO and PCLO are barred by the statute of limitations.

II

NONE OF PARKOWNER'S CLAIMS IS RIPE

A. Parkowner's Substantive Due Process And Equal Protection Claims Are Unripe

Parkowner argues without authority that the Ninth Circuit has not held that *Williamson's* state compensation prong applies to substantive due process or equal protection claims. Parkowner overlooks the Ninth Circuit opinion in *Shelter Creek Development Corp. v. City of Oxnard*, 838 F. 2d 375 (9th Cir. 1988). There, property owners brought both facial and as-applied challenges to an apartment conversion ordinance alleging it violated equal protection and due process. The Court in determining the claims were unripe, referenced its decision in *Kinzli v. City of Santa Cruz*, 818 F. 2d 1449 (9th Cir. 1987) noting: "We left no doubt that equal protection claims and due process claims are to be analyzed in the same way that regulatory takings claims are analyzed... ." 838 F. 2d at 379. Although it is true the Court went on to focus on the first *Williamson* prong, it never claimed the second prong did not apply to the facial claims. To the contrary, it directed that the facial claims be dismissed too, even though they did not have to satisfy *Williamson's* first ripeness prong.

Parkowner cites a Seventh Circuit opinion (*Forseth v. Village of Sussex ("Forseth")* 199 F. 3d 363 (7th Cir. 2000)), for the broad proposition that "Federal Courts have recognized that *Williamson's* ripeness requirements only apply to takings claims." Opp. at 17:20-21. Forseth, however, is not helpful to Parkowner on this point.

First, although *Forseth* did hold that a bona fide equal protection claim (one that was not alleged to circumvent ripeness requirements) was not subject to *Williamson*, the property owners' substantive due process and private takings claims were. 1990 F.3d at 368-370, and 369 n. 8.

Second, in *Patel v. City of Chicago ("Patel")*, 383 F. 3d 569 (7th Cir. 2004), the Seventh Circuit clarified its *Forseth* holding. It noted that *Williamson* did not apply to bona fide equal protection claims where the plaintiff alleged: a fundamental right or suspect classification; or "'governmental action wholly impossible to relate to legitimate government objections.'" 383 F. 3d at 573. The *Patel* panel went on to hold that the equal protection claim before it was not ripe because it was merely a recasting of the property owners' takings claim:

> Plaintiffs' characterization of both the injury they have suffered and the relief they seek places their claim squarely within the rubric of a takings claim and the coverage of *Williamson* County.

Id.

Likewise, Parkowner's equal protection claim here "is not based on membership in a protected class." It merely arises from the same core facts that support its takings claims. Thus, even if Seventh Circuit opinions were binding on this Court, Parkowner's equal protection and substantive due process claims would still be unripe.

B. Parkowner's Private Takings Claim Is Unripe

Parkowner argues, without authority, that *Williamson* ripeness does not apply to a private taking because government cannot take property for a purely "private" purpose even if it pays money for it. City has found no Ninth Circuit authority directly on point;

however, other Circuits have subjected private takings claims to *Williamson* ripeness requirement. *See, e.g., Forseth, supra* 199 F. 3d at 369 n. 8.

Moreover, with the Ninth Circuit's recent overturning of *Armendariz v. Penman*, 75 F. 3d 1311 (9th Cir. 1996)[2] (*see Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, ____ *F. 3d* _____, 2007 DJDAR 17779, 17781(9th Cir. Dec. 3, 2007)), it appears Parkowners's private taking claim should be treated as a stand-alone substantive due process claim that the ordinances effected a taking without a rational relationship to any legitimate public purpose. As discussed above, the Ninth Circuit applies ripeness requirements to substantive due process claims.

Finally the subjection of private takings claims to ripeness is consistent with the public policies underlying the Ninth Circuit's decisions concerning equal protection and substantive due process. It would prevent a plaintiff from recasting its public taking claim as a private taking claim to avoid ripeness requirements, and it would obviate simultaneous piecemeal adjudication of constitutional claims in both federal and state forums.

C. Parkowner Cannot Establish A Futility Exception To *Williamson*

Parkowner asserts it cannot obtain adequate compensation for its takings claims under the RCO, and the Court therefore should recognize a "futility" exception from *Williamson's* state compensation prong. *See* Opp. at 18-20. Specifically, Parkowner argues that the state procedure, an upward adjustment of future rents called a "Kavanau adjustment" (*see Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761(1997), is somehow inadequate. The Ninth Circuit, however, consistently has rejected this argument. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S.

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[2] In *Armendariz*, the Ninth Circuit had held that a property owner could not state a stand-alone substantive due process claim because such claim was subsumed within a Fifth Amendment takings claim.

687, 721 (1999); *Equity Lifestyle Propeties, Inc. v. County of San Luis Obispo,* _____ F. 3d ____, 2007 DJDAR 14419, 1421-22 (9th Cir. Sept. 17, 2007); *The San Remo Hotel v. City and County of San Francisco*, 145 F. 3d 1095, 1102 (9th Cir. 1998); and, *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F. 2d 359, 361 (9th Cir. 1993).

Parkowner does not argue any futility exception respecting its challenges to the PCONO or PCLO.

D. Regardless Whether Ripeness Doctrine Is Prudential, Dismissal Of Unripe Claims Is Mandatory

Parkowner argues that ripeness is a prudential doctrine citing, *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997). The Ninth Circuit has not squarely addressed the issue; however, where *Williamson's* two prongs are met, the Ninth Circuit has treated dismissal as mandatory. *See, e.g, Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F. 2d 616, 621 (9th Cir. 1992) ("If a claim is not ripe for review, the federal courts lack subject matter jurisdiction and they must dismiss").

Whether the doctrine is prudential only answers the question whether the dismissal comes from a lack of jurisdiction or simply a policy of declining jurisdiction over claims that are unripe. For example *Younger* abstention involves a similar situation wherein federal courts decline subject matter jurisdiction out of comity in deference to ongoing state proceedings. Even though the exercise of such abstention may be "prudential," dismissal is still mandatory where the requisite conditions for *Younger* abstention exist.

III

NONE OF PARKOWNER'S ALLEGATIONS STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED

A. Parkowner Does Not State A Facial Equal Protection Claim

As discussed above, Parkowner's facial claims with respect to the RCO and PCLO are time-barred. Moreover, Parkowner fails to explain in what matter those ordinances on

their face somehow violate equal protection. Mobilehome parkowners simply are not a protected class.

After asserting its constitutional claims were only facial (in an attempt to avoid ripeness issues) Parkowner nevertheless describes its equal protection claim as something other than a facial claim. Parkowner does not contend that the PCONO on its face treats similarly situated parkowners differently; indeed, it does not. Instead Parkowner appears to contend that it is City's very act of choosing to adopt a facially neutral ordinance that constitutes the equal protection claim. Opp. at 13:23-28. Parkowner notes that City did not enact such an ordinance prior to the conversion of Turner Lane Mobilehome Park.

City is unaware of any case in which the mere act of adopting a facially valid ordinance has been found to be an equal protection violation. Indeed any time a new ordinance regulates a class of property owners, a property owner can complain that similarly situated owners were not regulated prior to the ordinance's adoption. This is simply not an equal protection violation. In any event, Parkowner completely fails to consider that Turner Lane was converted from a resident-owned corporation and the Park therefore was not subject to the RCO. The threat of a sham conversion to avoid rent control simply did not exist. Parkowner's announced intention to convert, however, directly raised that concern. Therefore, Parkowner cannot show it was similarly situated with respect to Turner Lane or that there was no rational basis for adopting the PCONO.

B. Parkowner Fails To State A Substantive Due Process Claim

In its moving papers, City argued there was a rational basis for its adoption of the RCO and PCLO. Parkowner's Opposition ignores those arguments, and instead contends there is no rational basis for the PCONO. Opp. at 15-16.

Parkowner argues that a resident survey is not rationally related to whether a conversion is bona fide. Parkowner ignores the fact that it was the State Legislature which amended Government Code 66427.5 to provide for a resident survey to help

determine that very issue. Given that the most likely buyers of the spaces in a park are its current residents, a survey which shows little resident support is certainly indicative of a conversion not likely to succeed. If a Parkowner announces an intention to convert, where it seems likely to fail, a reasonable inference is that the Parkowner really is not interested in conversion, but merely wants to avoid rent control.

Parkowner ironically complains that the PCONO does not limit it as to the evidence it can use to rebut the presumption created by it. Certainly Parkowner could at least conduct a marketing survey, compile an interest list from interested buyers, and obtain refundable down payments from non-residents to show that notwithstanding an apparent lack of resident support, there are enough interested outside buyers to insure a successful conversion. This is not a novel idea. It is what condominium tower builders have to do to secure construction lending before they begin to dig their holes.

Finally, Parkowner suggests that it is entitled to a "trial" on whether the PCONO is rationally related to a legitimate government purpose. City is unaware of any case requiring a trial. Such facial claims are always resolved on the pleadings. The Court merely examines the face of the ordinance, compares its operative provisions with its purposes, and decides whether a legislator could rationally have believed the ordinance would achieve its purpose. *See, e.g., Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F. 3d 959, 966-67 (9th Cir. 2003). There are no facts to be "tried" here. The PCONO clearly states its purpose. City agrees it was passed in response to Parkowner's expressed intent to convert its park. There are no complex financial issues because the PCONO has no analyzable financial impact on Parkowner until it applies for conversion and goes through the process.

C. Parkowner Fails To State Either A Public Or A Private Takings Claim

In its moving papers City argued that Parkowner failed to state a takings claim, either public or private, as to the RCO and PCLO. Parkowner's Opposition largely

ignores those arguments and instead focuses on the PCONO. Opp. at 8-13 and 22-25.

The central problem with either takings theory is that the mere enactment of the PCONO took nothing from Parkowner. It merely regulates a conversion to resident ownership should Parkowner decide to do so.[3] On its face, the PCONO does not prohibit such conversion, or impose economically prohibitive impediments. More important, the PCONO simply does not on its face deny Parkowner economically viable use of its land. Even if Parkowner cannot convert its park for whatever reason, it can still operate it as an economically viable business, and receive a fair return under the RCO.

As for Parkowner's private taking claim, City believes it is simply a failed substantive due process claim. As discussed above, the PCONO is rationally related to a legitimate public purpose.

CONCLUSION

For the foregoing reasons, the Court should dismiss Parkowner's Complaint.

Respectfully Submitted,

Dated: December 5, 2007

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[3] Parkowner could avoid the PCONO altogether by selling the entire park to a resident-owned corporation, and then allowing the residents to subdivide it.